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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72-1492

JACINTO CARMONA,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF FOR MOORE-McCORMACK LINES, INC. IN OPPOSITION

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Jurisdiction

The judgment of the Supreme Court of the State of New York was entered on July 30, 1970. The order of the Appellate Division unanimously affirming the judgment of the Supreme Court was entered on October 31, 1972. On January 12, 1973 the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal to the Court of Appeals from the order of the

Appellate Division. The judgment of affirmance was entered in the Supreme Court of the State of New York on February 2, 1973. The petition for writ of certiorari was received by respondent on May 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Did the charge to the jury in this personal injury action based on negligence and unseaworthiness include prejudicial error?

Statement

The complaint alleged that "on or about March, 1964, plaintiff was caused to suffer an illness during the course and scope of his employment and during his service aboard the vessel" (7).* "That the above described illness was caused solely by the negligence of the defendant and the unseaworthiness of the vessel, without any fault on the part of the plaintiff contributing thereto" (8).

In reply to the defendant's demand for a bill of particulars the plaintiff swore on October 20, 1965 that he incurred a tubercular condition of the lungs in March, 1964 aboard the defendant's vessel by reason of the improper heating and ventilation in his quarters (13). In a supplemental bill of particulars, verified January 12, 1967 the plaintiff advised the defendant that he further contended that he incurred an activation and/or aggravation of a tubercular condition (19).

Plaintiff joined the defendant's vessel, the *Mormaccove*, on January 21, 1964 (42). The vessel was then four years

* Page numbers in parenthesis refer to the transcript of the trial record reprinted as the Record on Appeal to the Appellate Division.

old (197). He had his own bedroom with an adjoining shower and toilet (197). The vessel made a coastwise voyage, and on January 28, 1964 sailed across the North Atlantic to Scandinavia and Northern European ports (45). The ship returned to New York on March 10, 1964 (45). During this first voyage the plaintiff had no difficulty with the temperature in his room (220). Plaintiff testified that on his first trip the outside temperature was not cold; one could sit out on deck (46), but the ship's deck log recorded daily temperatures below freezing at various hours between February 16 and February 27 (Defendant's Exhibit C).

The *Mormaccove* left New York on the plaintiff's second voyage to Europe on March 17, 1964 (47). According to plaintiff's testimony there was a tremendous wind and it became cold three days after the ship sailed from New York; when he awakened the following morning his chest and throat hurt and he was coughing (48-49); cold air was coming into his room through the heater (49). The vessel's deck log shows the outside temperature did not go below 40° during the seven days the *Mormaccove* was engaged in its passage from New York to Antwerp (Def. Ex. D).

The plaintiff's room was heated by a hot and cold diffuser system and an electric heater (393). There was a steam radiator in the toilet and shower room which adjoined his bedroom (393, 617-619). Ship's officers went to the plaintiff's room to look at his heater the day after he complained about it (229). Thereafter ship's officers came to his room to look at his heater every day (233). The plaintiff put a towel in his heater the first night he felt cold (233).

Chief Engineer Yaeger checked the temperature in the plaintiff's room with a thermometer (393-394). Yaeger may have made as many as five visits to the plaintiff's room to check its temperature (395) and he found the tem-

perature to be comfortable (394). The Chief Engineer found the diffusing system, electric heater and radiator to be working all night (395) and he found towels stuffed into the ventilating system several times (396). Chief Officer Butler found the temperature in the plaintiff's room to be quite normal (593).

The plaintiff's examination at the United States Public Health Service facility in New York on November 15, 1963 included a chest X-ray which revealed a patchy clouding in the right upper lung field and right mid-lung field having the appearance of pneumonitis (Plaintiff's Exhibit 8; 780). The examination of the plaintiff by the defendant's physician on January 21, 1964 did not include an X-ray (148).

Plaintiff's Medical Testimony

William Weingarten, M.D. testified that the plaintiff was "*well when he boarded the ship*" [Mormaccove] (97) "and that most of us have a dormant or sleeping focus of tuberculosis within our body, mostly in the lungs, which is kept in check and within a limited area by the patient's resistance and ability to form antibodies" (97). It was the opinion of Dr. Weingarten that the plaintiff became chilled, developed a cough and a lower resistance and, therefore, was unable to cope with the tubercular bacilli within his body (98).

Defendant's Medical Testimony

Lawrence Scharer, M.D., reviewed the plaintiff's chest X-ray, dated November 15, 1963 (Plaintiff's Exhibit 19) and the X-rays taken March 28, 1964 (Plaintiff's Exhibits 20A and 20B) and concluded that the plaintiff clearly had evidence of early tuberculosis in the right upper lung field in November, 1963 and the X-rays of March, 1964 showed

the same disease at a different stage of its progression (532-533).

Charge of the Court

The Court charged the jury that the plaintiff alleged that in March of 1964 he became ill with tuberculosis because of the failure of the defendant to provide and maintain suitable quarters for him aboard ship (671, 672).

The issue as stated by the Court was "whether the condition of the plaintiff or the reactivating of the plaintiff's tuberculosis was caused through the failure of the defendant to provide the plaintiff with proper quarters aboard ship or whether the defendant negligently failed to repair the broken manual device, if it became broken during the course of the voyage, and thereby caused or contributed to the illness or activated the tuberculosis of the plaintiff (674).

In its consideration of the claim of unseaworthiness the Court charged the jury that improper working conditions aboard ship which proximately cause or contribute to the seaman's illness will make the vessel unseaworthy (676). The judge told the jury that an act or failure to act is a proximate cause of an injury if it is a substantial factor in bringing about the injury or without which factor the injury would not have occurred (678).

The jury was also charged that for the plaintiff to recover and for the defendant to be held responsible for the illness of the plaintiff, the reactivated tubercular condition of the plaintiff must have resulted as a natural and proper consequence of the defendant's failure to provide plaintiff with a proper living quarters or a seaworthy vessel or the defendant must have been negligent in whole or in part or in some way contributed to the plaintiff's illness through an act or omission from which defendant could

reasonably foresee that an injury or illness could probably occur (685).

In its charge on damages the Court instructed the jury as follows:

> "You must remember that the plaintiff's claim is that the defendant caused his tubercular condition to be reactivated and you must apportion damages accordingly.
>
> If the plaintiff's condition was reactivated or aggravated, plaintiff is entitled to recover for any disability or pain resulting from the reactivation or aggravation. He is not, however, entitled to recover for any particular ailment or disability which existed prior to this alleged incident or for any condition or illness from which he may now be suffering which was not caused by this alleged defective air circulating system.
>
> Recovery must be confined to those damages due to the enhancement and aggravation or reactivation of the plaintiff's tubercular condition. In essence, the plaintiff should be compensated only to the extent that you find that he was further disabled by the defendant's negligence or the defendant's failure to provide living quarters" (692-693).

Argument

The petitioner urges that a seaman who seeks to recover damages for personal injuries based upon allegations of unseaworthiness should not have the burden of establishing that the unseaworthiness was the proximate cause of his injury. No direct authority is offered for this proposition. It is the petitioner's argument that a seaman claiming damages for unseaworthiness should be

required to meet only the standard of causation required in a Jones Act suit.

The petitioner would overlook that a plaintiff in a Jones Act suit is favored with the special standard of negligence that has been imposed under the Federal Employers' Liability Act; a standard unlike any imposed by the general maritime law. In searching for statutory guidance to determine the beneficiaries who were entitled to recover in an action under the general maritime law for death caused by violation of maritime duties, this Court wrote in *Moragne* v. *State Marine Lines*, 398 U. S. 375, 407 (1970) with regard to the Jones Act as follows:

> ". . . the beneficiary provisions of the Jones Act are applicable only to a specific class of actions—claims by seamen against their employers—based on violations of the special standard of negligence that has been imposed under the Federal Employers' Liability Act. That standard appears to be unlike any imposed by general maritime law."

Moreover, in the case at bar there was no issue as to notice and the jury concluded that the defendant was not negligent. The Trial Judge instructed the jury:

> "The agreed testimony in this case is that the manual device controlling the flow of air into the plaintiff's room was operating properly at the inception of the voyage. At a certain time after the ship departed from New York, the plaintiff complained that the room was cold and that the system of ventilation was not functioning properly.
>
> It is undisputed that the plaintiff brought this alleged condition to the attention of the chief steward and other supervisory personnel of the defendant aboard ship.

> If this alleged condition existed and notice was given by the plaintiff to the defendant and then the defendant was—then the defendant was obligated to repair and restore the air circulating system so that it would function properly and the failure of the defendant to repair the system constitutes negligence. On the other hand, if you find the air circulating system was not defective or that there was no negligence on the part of the defendant or that the negligence of the defendant played no part whatsoever in causing the plaintiff's illness, your verdict will be for the defendant on this cause of action."

The jury was given interrogatories with regard to the negligence action. The interrogatories are printed at pages 21A and 22A of the Petition. The jury answered these interrogatories in the negative finding that the petitioner had failed to sustain his burden of proof that the defendant was negligent and that defendant's negligence played any part in causing the plaintiff's illness.

CONCLUSION

The petitioner's theories of liability were fully explained to the jury. Having resolved the negligence claim in favor of the respondent the facts in this case required the jury to also find for the respondent on the unseaworthiness claim.

We respectfully submit that the petition for certiorari should be denied.

Dated: New York, N. Y.
June 5, 1973

Respectfully submitted

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